IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1274 of 1999

with

CRIMINAL APPEAL No 1345 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MITHUBHAI OSMANBHAI SUMRA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1274 of 1999
   MR LR PATHAN for Petitioner No. 1
   MR BD DESAI, LD. APP for Respondent No. 1
2. Criminal Appeal No. 1345 of 1999
   MR NIGAM SHUKLA for Petitioner No. 1
   MR BD DESAI, LD. APP for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH
and
MR.JUSTICE H.H.MEHTA

Date of decision: 01/05/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE D.P.BUCH)

1. The appellants above named have preferred these two Criminal Appeals under Section 374 of the Code of Criminal Procedure, 1973, challenging the judgment and conviction order dated 21st October, 1999, in Special Case No.169/94 under which the learned trial Judge convicted the two appellants for an offence punishable under Section 17 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as `the said Act'), and sentenced them to suffer R.I for 10 years. The appellants were also directed to pay fine of Rs.2/- lacs and in default of payment of fine they were required to undergo further imprisonment for three years. The trial Court has also convicted the two appellants for an offence punishable under Section 195 of the Indian Penal Code and sentenced them to suffer R.I. for 10 years. The trial court also directed that the substantive sentence be run concurrently.

2. The prosecution case against the appellants before the trial court may be briefly stated as follows:

2.1 One Shri Ramdevsinh Bharatsinh Gohil, Police Sub-Inspector of Palitana Police Station received an information on 1.4.94 to the effect that in the house of Naginbhai, Manager of Banaskantha Jain Dharamshala, some quantity of opium was lying. Instead of reducing the said information in writing, the said PSI conveyed the said information to the Sub-Divisional Police Officer Mr.Katara on telephone. Mr.Katara also arrived there and thereafter panchas were invited and they had all gone to the said Dharamshala in the house of Naginbhai, Manager of the said Dharamshala. On carrying out the search of the said house of Naginbhai, a plastic bag was found on a table and when it was slightly pushed ahead, 160 gm. of opium was found on the said table.

2.2 At the time when the said PSI started drawing panchnama of the aforesaid event, Naginbhai, the Manager, who was present there, stated to the police that he did not know anything about the said opium. However, one Mithubhai Osmanbhai, watchman of the said Dharamshala was present there and he voluntarily told the PSI that the

said opium was placed by him at the said place at the instance of milkman Vajabhai Gagabhai Gadhvi.

2.3 Accordingly, panchnama was drawn stating the aforesaid aspects of the case represented to the PSI by Mithubhai and thereafter the concerned police officer arrested the said milkman Vajabhai Gagabhai Gadhvi and also Mithubhai Osmanbhai. Chargesheet was filed against them. No process was undertaken against Naginbhai by the said PSI. On receiving the chargesheet, it was registered as Special Criminal Case No.169/94. The appellants were provided the copies of the police investigation papers. Charge was prepared and framed against the appellants. The appellants pleaded not guilty to the said charge when it was read over and explained to them and therefore the trial court recorded the evidence against the appellants.

2.4 After conclusion of oral evidence and after production of necessary documents, the trial court recorded further statements of the appellants under Section 313 of the said Code. Arguments were heard and the trial court found the appellants guilty for the aforesaid offences, therefore, the trial court heard the appellants on the quantum of punishment, and after hearing the appellants on the quantum of punishment, the trial court inflicted the aforesaid punishment on the two appellants.

2.5 Feeling aggrieved by the said judgment and conviction order of the trial court, the appellants have preferred two separate appeals before this Court. Mithubhai Osmanbhai has filed Criminal Appeal No.1274/99 whereas Gadhvi Vajabhai Gagabhai has filed Criminal Appeal No.1345/99.

2.6 At the time of receiving the appeals and at the stage of admission/hearing, this Court had admitted the two appeals and the appellants continued to be into custody as the prayer for bail was not pressed. This Court also observed that the hearing of the appeals deserves to be expedited and therefore ordered accordingly.

2.7 At the stage of final hearing, the appeal was argued by Mr.Nigam Shukla for Vajabhai Gagabhai Gadhvi original accused No.1 before the trial court, whereas, Mr.L.R.Pathan, learned advocate appeared for Mithubhai Osmanbhai - original second accused before the trial court. On the other hand, Mr.B.D.Desai, learned APP has appeared for the State in both the appeals.

2.8 The appellants have mainly contended before this Court that the raid was carried out by PSI who was not a Gazetted Officer. That he was obliged to record the information received by him immediately after receipt of the same. That the said information was not reduced into writing by the said PSI immediately. That it was not conveyed to his immediate superior officer. That, therefore, there is material omission on the part of the said PSI, and since this statutory provision has been over-looked by the said PSI, further proceedings undertaken by him and the entire trial would stand vitiated.

2.9 It has further been contended that there are material contradictions between the evidence of PSI and the evidence of SDPO. That in fact the muddamal was seized from the house of Naginbhai and he has not been arrested at all. That in fact the two appellants had no connection with the above muddamal and this aspect has been totally over-looked by the trial court. That, in short, there was no case against the appellants and, therefore, the trial court has committed serious error in law in convicting the two appellants. That the judgment and conviction orders recorded by the trial court are illegal, errorneous and deserves to be set aside.

2.10 The appellants in both the appeals have prayed that the present two appeals be allowed, the judgment and conviction order recorded by the trial court may be set aside, the appellants may be held not guilty for the aforesaid offence and they may be ordered to be set at liberty forthwith.

2.11 During the course of hearing, the learned advocates for the respective parties have taken us through the legal aspects of the case. They have also taken us through the oral and documentary evidence on record as well as the observations made by the trial court during the course of the judgment.

2.12 As stated above, it was a case of the prosecution before the trial court that the informant PSI had received an information that opium was lying in the house of Naginbhai and, therefore, the PSI informed the SDPO and thereafter raid was carried out.

2.13 Now, it is more or less an admitted position that the said PSI had not reduced the said information, received by him, into writing. For this purpose, we can consider the evidence tendered by the said witness.

Ramdevsinh Bharatsinh Gohil P.W. 1 Exh.13 was the PSI at Palitana Police Station, on 1.4.94, who had received the said information at about 1.00 p.m. when he was on patrolling in the company of other police personnel. He has stated that lastly they had gone to Chakla Police Station where the informant had informed him that opium was lying in the house of the Manager of Banaskantha Jain Dharamshala which is situated on Taleti Road at Palitana. He has then stated that he conveyed the said information to SDPO Mr.Katara telephonically and thereafter Mr.Katara arrived there, panchas were called and preliminary panchnama was drawn.

2.14 He has deposed that the aforesaid information was not immediately reduced in writing by him. This has been clarified by him during the course of his cross-examination. If we go through the evidence given by him in para 6, then there he has positively admitted that the information received by him was not reduced into writing by him. This shows that it is an admitted position that the information received by him at the Chakla Police Station was not reduced into writing by him.

3. Mr.B.D.Desai, learned APP has argued on the point that the concerned PSI was on patrolling duty and, therefore, he could not have reduced the said information into writing. It is difficult to agree with the said argument of the learned APP in view of the fact that the PSI has himself stated in so many words in para 1 of his examination in chief at Exh.13 that lastly he had gone to Chakla Police Chowky where the informant had conveyed the aforesaid information to him. It is clear that the PSI had received the information at the Chakla Police Chowky.

4. Then there is no other evidence on record to show that the information received by the said PSI was reduced into writing by him. So, on one hand, the PSI has admitted in so many words that the information received by him was not reduced into writing. On the other hand, there is no other evidence on record to show or even suggest that such an information was reduced into writing by him. We have, therefore, to conclude that the information received by the complainant PSI as aforesaid was not reduced into writing by him.

5. Then attempt was made to argue on behalf of the State that preliminary panchnama was drawn by the PSI, and in the said preliminary panchnama, the fact of information received by the said PSI has been mentioned. The said panchnama can be gathered at Exh.20. In

preliminary panchnama Exh.20, it has been stated that the police had received an information that opium was hidden behind the T.V. in the residence of Naginbhai being the Munim of Banaskantha Jain Dharamshala situated at Taleti Road at Palitana.

5.1 Now if we again revert to the evidence of PSI at Exh.13, then we can gather that there he has stated that he has received an information at the Chakla Police Chowky that opium was lying near T.V. in the house of Manager of the said Dharamshala situated on Taleti Road at Palitana. It is important to mention that the name of Naginbhai has been found in preliminary panchnama Exh.20 whereas his name was found absent in oral testimony of PSI Mr.Gohil at Exh.13. This shows that there is apparent contradiction on two aspects wherein PSI Mr.Gohil Exh.13 was a party. This is a contradiction on material particular and therefore becomes an important also.

5.2 Then we can also turn to the evidence of Mr.Katara who was examined before the trial court as prosecution witness at Exh.28. It would be important to note that, as per the evidence of this witness, he had received a telephonic message from the complainant PSI Mr.Gohil at about 2.00 p.m. on 1.4.94, that there was information about opium and therefore he should go to Chakla Police Chowky. Thereafter, he called the driver and reached the said Police Chowky at 2.30 p.m. This shows that the entire basis of information or atleast the material particular of this information received by PSI Mr.Gohil has not been conveyed even orally to Mr.Katara by Mr.Gohil. As stated above, the information was that opium was lying in the house of Naginbhai, Manager of the said Dharamshala situated on Taleti Road at Palitana, whereas, the information conveyed to Mr.Katara, SDPO, was that there was an information about opium and, therefore, he could go to Chakla Police Chowky. The name of Naginbhai or his designation or the situation of the Dharamshala are all absent in the said information received by Mr.Katara.

5.3 The main object of reduction of information in writing is that there would be a writing as to the actual information received by a particular officer. If the information was actually reduced into writing immediately after receipt of the same, then this contradiction would not have been found on the record of the trial court at all. Here we find that there are contradictory versions about the actual information received by PSI. The PSI and other witnesses have given contradictory versions on

the point as to what was the real text or substance of the information received by the PSI.

5.4 Then it is also required to be considered that PSI Mr.Gohil at Exh.13 has deposed in his cross-examination that after arrival of Mr.Katara and on his instruction he had called two panchas Ashoksinh Mangalsinh Gohil and Ranabhai Bharwad. He has also deposed that the above information was conveyed to the said panchas. There also the name of Naginbhai is absent inasmuch as the PSI has given evidence before the trial court that he had informed the panchas at the time of preparing preliminary panchnama that opium was lying near T.V. in the house of the Manager of Banaskantha Jain Dharamshala.

5.5 Then we again turn to the evidence of Mr.Katara at Exh.28 who has deposed before the trial court that panchas were invited and thereafter panchnama was drawn. Any way the panch witness Ashoksinh Gohil has not deposed before the trial court as to what was the information received by the PSI. In other words, the information received by the PSI was not conveyed by him to the panch witness Ashoksinh Exh.19. Any way the fact remains that the witnesses have given contradictory version as to what was the real information received by PSI Mr.Gohil Exh.13.

5.6 This is the reason why the information is required to be reduced into writing. Had there been an information in writing or if the information was reduced into writing by PSI Mr.Gohil Exh.13 immediately then the inconsistency would not have remained on paper. Here we find that the evidence of PSI Mr.Gohil Exh.13, the evidence of panch witness Ashoksinh and evidence of SDPO Mr.Katara differs from one another as to what was real information received by the PSI. Therefore, on one hand, whatever information received by PSI Mr.Gohil Exh.13 has not been reduced into writing and thereby the said officer has committed violation of the provisions made in Section 42(2) of the Act. On the other hand, the evidence on the point as to what was the real information received by PSI is not consistent.

5.7 Again it is a fact that the panchnama was drawn atleast 1 1/2 hours after receipt of the information since the information received was not reduced into writing, and since even the kachcha note of the information so received was not made by the PSI Mr.Gohil Exh.13, the above inconsistency have appeared on record. Moreover, the above evidence makes it clear that the witnesses are not consistent on the point as to what was

the information received by PSI Mr.Gohil Exh.13. Again looking to the nature of evidence tendered as aforesaid, it also becomes doubtful as to whether the information was actually received and whether it was in terms of the evidence given by PSI Mr.Gohil.

5.8 Even we find that as soon as PSI Mr.Gohil and DY.S.P. Mr.Katara reached the spot at the residence of Naginbhai and though the muddamal opium was found lying on the table behind the T.V., witness Naginbhai made a statement that he was unaware about the said opium and appellant Mithubhai conveyed that it was an opium placed there by him at the instance of another appellant Vajabhai Gagabhai. Surprisingly, both the police officers accepted the said defence of Naginbhai and totally relieved Naginbhai from the clutches of the offence in question. Thereby, Mr.Gohil and Mr.Katara both have become the judges in order to decide that Naginbhai was totally innocent but the real culprits were the present appellants. We are of the opinion that this was not a wise or prudent act on the part of PSI Mr.Gohil and SDPO Mr.Katara to out right relieve Naginbhai from the case itself at the very beginning though the opium was found from the room of Naginbhai. Considering the quantum of opium seized from the house of Naginbhai, it can reasonably be inferred that it would smell of opium and this being the only room mainly used by Naginbhai, Naginbhai could have been attributed with the knowledge of the presence of the said muddamal opium at the said place in his own room and yet Naginbhai has been relieved out right at the very first instance by PSI Mr.Gohil and SDPO Mr.Katara.

5.9 As regards appellant Vajabhai Gagabhai also, we find that there is some contradictory version on record with respect to the identity of the said appellant.

5.10 If we may revert to the evidence of PSI Mr.Gohil Exh.13 again, we find that he has deposed that when the opium was being seized from the room of Naginbhai, Mithusing arrived there and told that the said opium was placed by him at the instance of Gadhvi Vajabhai Dadabhai. Now Vajabhai Dadabhai was not an accused before the trial court and he is not an appellant before this Court. The appellant before this court and the accused before the trial court is Gadhvi Vajabhai Gagabhai. Therefore, though the name of Gadhvi Vajabhai was disclosed by appellant Mithusing, it seems that further inquiry was not made with respect to Vajabhai Dadabhai.

5.11 In para 6 of his evidence, PSI Mr.Gohil Exh.13 has again reiterated that the name of appellant Vajabhai has been mentioned in the FIR as well as in panchnama as Vajabhai Dadabhai. He has denied that the name of the father of the said accused appellant is Gagabhai. Therefore, on one hand, we find Vajabhai Gagabhai as accused before the trial court and convict/appellant before this Court, on the other hand, his name was shown as Vajabhai Dadabhai by the PSI right from the beginning. This position has never been clarified.

5.12 If we turn to the evidence of panch witness Ashoksinh at Exh.19, he is totally silent on the point that appellant Mithusing had told that he had placed the said opium in the house of Naginbhai at the instance of another appellant Vajabhai Gagabhai. The entire episode involving the two appellants is absent in the evidence of Ashoksinh Exh.19. His evidence shows that the witness has not been treated hostile and no permission was sought from the trial court to put the question in nature of cross-examination to this witness. This clearly shows that there is apparent contradiction between the evidence of informant PSI Mr.Gohil Exh.13 and the evidence of panch witness Ashoksinh Exh.19. In other words, the involvement of the two appellants as stated by the PSI has not been supported by independent panch witness Ashoksinh. The prosecution has not explained the said omission from the evidence of the said witnesses. In our view, this is an important omission amounting to contradiction on material particulars between the evidence of two witnesses. In that view of the matter, the evidence given by PSI Mr.Gohil at Exh.13 would become doubtful also.

5.13 Then Panchnama Exh.20 clearly shows that when the opium was found from the table behind the T.V. in the room of Naginbhai, an inquiry was made from Naginbhai and Naginbhai conveyed that it was opium. That, at that time, Mithubhai Osmanbhai, appellant in one of these appeals disclosed that it was placed by him at the instance of another appellant Vajabhai Dadabhai. There also the name of said appellant in panchnama has been shown as Vajabhai Dadabhai. Then it is required to be considered that this fact of panchnama has not been supported by the evidence of the said panch witness Ashoksinh who has not stated before the trial court that appellant Mithusing had told that he had placed the said opium on the said table behind the T.V. at the instance of Gadhvi Vajabhai Dadabhai. Therefore, in panchnama also, the name of appellant Vajabhai Gagabhai has not been mentioned.

5.14 It is also required to be considered that, so far as appellant Mithusing is concerned, he did not say that it was opium. It is true that Naginbhai admitted that it was opium. However, he was not an accused person before the trial Court and, therefore, we refrain from making any observation to the said statement of Naginbhai made by him at the time when the panchnama was prepared.

6. Head Constable Bharatsinh Jatubha Exh.21 has deposed that when preliminary panchnama was being drawn in presence of panchas, SDPO Mr.Katara arrived there. This clearly shows that Mr.Katara arrived there after the panchnama was commenced. The witness has also stated that the said panchnama was drawn after the arrival of the panch witnesses. PSI Mr.Gohil Exh.13 has deposed that panchas were called at the instance of Mr.Katara. Now, if the panchas were invited at the instance of Mr.Katara, then the panchas would not be present and drawing and recording of preliminary panchnama would not have been commenced before the arrival of Mr.Katara, but this Head Constable makes it clear that panchas were invited, they were given to understand that they were required to go for a raid, that preliminary panchnama was made, and when the said panchnama was in process, Mr.Katara arrived there. This would again be an apparent contradiction between the evidence of PSI Mr.Gohil and this witness Bharatsinh Exh.21.

6.1 This witness again says in para 3 of his cross-examination that Mithusing had disclosed the name of Vajabhai Dadabhai who was not an accused before the trial court and who is not an appellant before this Court. This would again create doubt as to whether Mithusing had disclosed the name of Vajabhai Dadabhai or Vajabhai Gagabhai.

7. Bharatsinh Jasvantsinh Gohil Exh.22 is the Writer Head Constable who had handed over the muddamal to another Bharatbhai. Then there is an evidence of Bharatbhai Rambhai Exh.23 who has carried the muddamal to the Forensic Science Laboratory, Junagadh, and brought its receipt at Exh.24. Kishorbhai Jantibhai Undviya Exh.25 was invited there to carry out the weighment of muddamal article. He has not supported the case of the prosecution and therefore he has been treated hostile. However, nothing fruitful material has been found in his cross-examination.

8. Then there is an evidence of Naginbhai Exh.27 who was working as a Manager in the said Dharamshala and from

whose room muddamal opium was recovered. According to his evidence, on 1.4.94, at about 7.00 a.m., when appellant Vajabhai came to serve milk, he was sleeping and Vajabhai Gagabhai told his wife (wife of Naginbhai) that he was going out of town and therefore he would not be able to supply the milk. That thereafter the raid was carried out by PSI Mr.Gohil and Mithusing told that he had placed the said packet at the instance of Vajabhai Gagabhai. There the name of appellant Vajabhai Gagabhai has been disclosed by this witness. However, from the evidence in para 6 it seems that the witness had initially given the name of the appellant as Vajabhai Dadabhai whereas in the evidence before the court he had given the name of Vajabhai Gagabhai. This is again an important contradiction on material particular going to the root case of the prosecution. It is more so when Vajabhai was not present at the commencement of the raid. He had not reached there when the raid was going on. He was not again present when the raid was completed and, therefore, at the initial point of time the prosecution had shown the name of Vajabhai Dadabhai on record. Then it would be for the prosecution to clarify as to why the name of Vajabhai Dadabhai was placed on record at the first instance and what necessitated the prosecution to change the name of said accused from Vajabhai Dadabhai to Vajabhai Gagabhai. The prosecution has again to establish that Vajabhai Dadabhai and Vajabhai Gagabhai is the same person.

9. Then we can turn to the evidence of Mr.Katara, SDPO at Exh.28 who was present when the raid was carried out. The witness refers to Naginbhai saying that Naginbhai had not told that it was opium and that he did not know about the same. He has further stated in para 4 of his cross-examination that Mithusing had given the name of Vajabhai Dadabhai. Again, therefore, it becomes doubtful as to whether Mithusing had referred the name of Vajabhai Dadabhai or not. The witness has further stated that in panchnama it has been stated that, on an inquiry, Naginbhai said that it was opium and, therefore, it was again a contradictory version given by Mr.Katara. At one point of time he did say that Naginbhai conveyed that it was opium whereas in the oral evidence before the trial court he stated that Naginbhai did not say that it was opium. He has again said that the statement made in panchnama that on inquiry Naginbhai said that it was opium was correctly mentioned in the panchnama. This would clearly show that whatever deposed by him was not a true fact. He further states in cross-examination that Naginbhai was never arrested. It is required to be considered that, as said above, the PSI as well as SDPO

both have accepted the version of Naginbhai and diverted the offence and investigation against the present two appellants without giving the name of Naginbhai as one of the accused person.

10. At the same time, it would also become a matter of doubt, if Vajabhai would entrust the opium to Mithusing with an instruction to place it behind the T.V. in the room of Naginbhai. It is difficult to accept that Mithusing had placed it there in the room of Naginbhai. The involvement of Mithusing and Vajabhai Gagabhai - the two appellants again becomes doubtful in view of the aforesaid facts and circumstances of the case.

10.1 If Mithusing enters the room of Naginbhai and when the wife of Naginbhai was present in the house then in that event it would be very difficult to accept that Mithusing had successfully placed the packet of opium behind the T.V. in the room of Naginbhai without being noticed by Naginbhai or his wife who were both present in the house. It is difficult to accept that Mithusing had placed or would place the said article in the room of Naginbhai. It is again difficult to accept that he did it at the instance of co-accused Vajabhai.

11. The Investigating Officer has been examined at Exh.29, who has deposed in para 5 that he never inquired about Vajabhai Dadabhai. He denied that there was another person named Vajabhai Dadabhai who used to supply milk in the aforesaid Dharamshala in which Naginbhai was Manager. When the record discloses the name of Vajabhai Dadabhai, then it was the duty of the Investigating Officer to inquire as to whether there was any person having name Vajabhai Dadabhai.

12. Then we can turn to the evidence of Mr.Bipinchandra H.Thakar Exh.17, who was working as J.M.F.C. at Palitana. He has deposed before the trial court that CPI Palitana had brought appellant Mithusing to him at 20.30 hrs on 1.4.94 whereas the CPI has deposed in para 8 of his evidence that it is not true that he had produced the second accused before the learned Magistrate at 10.30 p.m. on 1.4.94. The learned Magistrate has stated that he explained to the said appellant about the provisions of Section 164 of Cr.P.C. and also asked some questions to him. He was also given to understand that his statement will be used against him. Thereafter whatever accused told, was written down and read over to him and he put his thumb impression on it. The witness has produced the said statement at Exh.18.

13. It is important to note that the statement of appellant Mithusing recorded by Mr.Thakar and produced at Exh.18 again indicates the name of Vajabhai Dadabhai at both the places. It does not refer the name of Vajabhai Gagabhai. The name of Vajabhai Dadabhai has been repeated also, therefore it cannot be said that there was some mistake on the part of the learned Magistrate in mentioning the name of Vajabhai in the said statement.

14. According to the statement of appellant Mithusing, Exh.18, on the date of incident Vajabhai had arrived there to supply milk at the house of Naginbhai. Then at that time he was also present and Naginbhai was sleeping on a mattress at a distance of 2 feet and at that time Vajabhai took out the said packet from his pocket and placed the said packet near the T.V. and thereafter he told the witness (appellant Mithusing) to push the muddamal packet. This was not the statement made by Mithusing to the PSI or to Mr.Katara at the time when panchnama was drawn. Therefore, the statement made by appellant Mithusing at the time of panchnama and the statement made by him before the learned Magistrate at Exh.18 are contradictory.

14.1 Moreover, the appellant is again silent in his statement Exh.18 as to whether he actually touched the said packet and pushed it as per the instruction of appellant Vajabhai. If the packet was not pushed behind the T.V. then it would be visible from any corner of the room. Moreover, the evidence on record is to the effect that the said packet was seized from behind the said T.V. Then it is not clear as to how the packet changed its position and went to a place behind the said T.V. Naginbhai has not clarified the position and his wife has not been examined as a witness. The two appellants were not required to say about the same as they were accused before the court. Moreover, if the appellants had placed the said muddamal packet at a place behind the T.V. in the room of Naginbhai, it is very difficult to accept that appellant Mithusing would voluntarily make a statement that it was a packet placed by appellant Vajabhai at the said place and he pushed it behind the T.V. It is more so, when it was found to be an opium.

14.2 The initial part of investigation discloses that the PSI Mr.Gohil had not followed the requirement of law that the information received is required to be reduced into writing then the subsequent proceedings would automatically stand vitiated, and therefore, it would not be very much necessary to discuss the statement made by appellant Mithusing before the learned Magistrate.

Moreover, looking to the nature of evidence given by this witness, it is only a statement which simply involves the colleague appellant Vajabhai. Moreover, the statement made by him before the learned Magistrate has some contradiction with the evidence given by PSI Mr.Gohil, SDPO Mr.Katara and panch witness Ashoksing. In that view of the matter, it would be difficult to depend upon the said statement of appellant at Exh.18 in order to convict the two appellants for a serious offence like one punishable with imprisonment for not less than 10 years. It is more so when there is no inculpatory part in the statement. It does not show involvement of the deponent but it only involves co-accused. It is very risky to rely upon such a statement.

15. The entire case of the prosecution appears to be highly unnatural and improbable. The information related to the opium in the house of Naginbhai. It was not reduced into writing. During the raid, the muddamal opium was recovered from the house of P.W. Naginbhai. The appellant Mithubhai came to the spot and said that he had placed the muddamal there at the instance of co-accused Vajabhai. The PSI and DYSP both accepted the said words of appellant Mithubhai, did not even arrest Naginbhai and submitted chargesheet against Mithubhai and Vajabhai.

16. The statement of Mithubhai before the learned Magistrate under sec.164 of Criminal Procedure Code, is different one. It does not involve Mithubhai but only involves Vajabhai. The statement of Mithubhai made to the PSI and the DYSP is not admissible in evidence since it is a statement of an accused person before and in presence of police officers connected with the said search and seizure. The statement of Mithubhai before the learned Magistrate under Section 164 of Criminal Procedure Code made by appellant Mithubhai is almost exculpatory. It does not involve the deponent but only involves co-accused Vajabhai. There is no other evidence on records to show that Vajabhai had asked Mithubhai to place the muddamal in the room of Naginbhai. Except the said words of Mithubhai, there is absolutely no other evidence on records to prove the involvement of Vajabhai in the offence. There is also no evidence to prove that Vajabhai had given this muddamal to Mithubhai with an instruction to place it in the room of Naginbhai. There is no evidence of enmity amongst Naginbhai, Vajabhai and Mithubhai. Hence it is not possible to gather as to why Vajabhai should tell Mithubhai to place the muddamal in the room of Naginbhai and as to why Mithubhai should follow the said instruction and as to why he should place

the muddamal in the room of Naginbhai.

17. Once the statement of Mithubhai, involving Vajabhai in the present offence is excluded from consideration, there is absolutely no evidence to connect Vajabhai with the muddamal article.

18. Moreover, there is also a doubt on the point if Vajabhai referred was really Vajabhai Dadabhai or whether it was a reference to the present appellant. The prosecution did not offer any explanation on the point.

19. Mithubhai had no reason to be there at the search and to tell a story involving him and Vajabhai in a very serious offence.

20. Any way, the entire story advanced by the prosecution is highly unnatural and improbable and hence not acceptable.

21. At this stage, we may refer to a decision of the Hon'ble Apex Court in the case of Abdul Rashid Vs. State of Gujarat reported in AIR 2000 SC 821. It would be worthwhile to refer to paragraphs 18 and 19 at page 826 as follows:

> "Learned counsel for the State of Gujarat thereupon contended that as the appellant did not dispute the factum of recovery of the "Charas" from the vehicle it does not matter that the information was not recorded at the first instance by the police officer. We cannot approve the contention because non-recording of information has in fact deprived the appellant as well as the Court of the material to ascertain what was the precise information which PW-2 got before proceeding to stop the vehicle. Value of such an information, which was the earliest in point of time, for ascertaining the extent of the involvement of the appellant in the offence, was of a high degree. A criminal Court cannot normally afford to be ignorant of such a valuable information. It is not enough that PW-2 was able to recollect from memory, when he was examined in Court after the lapse of a long time, as to what information he got before he proceeded to the scene. Even otherwise, the information which PW-2, in this case, recollected itself tends to exculpate the appellant rather than inculpate him."

22. In the present case also, we find that the said salutary provisions have not been complied with, and in fact, there is no dispute about the same and, therefore, non-compliance is an admitted fact. When the salutary provisions which are mandatory in nature have not been complied with, then in that event, it would be very difficult for this Court to confirm the judgment and conviction order of the trial court.

23. In para 20 of the said judgment, the Hon'ble Supreme Court has referred to the provisions made in Section 35 of the said Act which provides for presumption of culpable mental state. The Hon'ble Supreme Court has observed in para 21 that, if the court entertains strong doubt regarding the accused's awareness about the nature of the substance in the gunny bags, it would be a miscarriage of criminal justice to convict him of the offence keeping such strong doubt dispelled. In other words, the Hon'ble Supreme Court has observed that the prosecution can not take the shelter of the legal presumption under Section 35 of the said Act for the purpose of convicting the accused persons. It is, therefore, very clear that in the present case the information received by informant PSI Mr.Gohil at Exh.13 has not been reduced into writing and, therefore, it has not been conveyed in writing to his superior officer Mr.Katara.

24. Learned advocate for the appellant has argued that the information was required to be conveyed to the immediate superior officer. That Mr.Katara being SDPO was not an immediate superior officer and, therefore, PSI Mr.Gohil at Exh.13 ought to have conveyed the said information to the CPI which has not been done and, therefore, also there is non compliance of sub-sec.(2) of Section 42 of the said Act. In the present case, we find that in view of the evidence on record and considering the law applicable to the facts of the case on record, it is not necessary to consider and decide as to whether the information, if any, conveyed to SDPO by the PSI instead of conveying to CPI would be legal or not and, therefore, we do not express any opinion with regard to said argument of the learned advocate for the appellants.

25. Any way it remains on record that the salutary and mandatory provision of sub-sec.(1) and sub-sec.(2) of Section 42 of the said Act has not been complied with and even otherwise on factual aspect also the case of the prosecution has not been proved beyond reasonable doubt against the two appellants and, therefore, we are of the

considered opinion that the trial court has committed a serious error in law as well as on fact in holding that the present appellants were found in illegal possession of opium without any pass or permit or licence. We find that, on one hand, the statutory provisions have not been complied with, and on the other hand, we find that even on fact the evidence produced by the prosecution is not free from doubt and, therefore, the appellants are entitled benefit of doubt. Therefore, the appellants, in our view, could not have been convicted by the trial court on the evidence which was there on the records of the trial court.

26. In above view of the matter, we allow these appeals and set aside the judgment and conviction order recorded by the trial court which are impugned in these appeals. We find the appellants not guilty for the offence in question and we acquit both of them, and as both the appellants are in jail, they shall be set at liberty forthwith if no longer required in any other case.

At this stage, Mr.Nigam Shukla, learned advocate appearing for the appellant-accused in Criminal Appeal No.1345/99 states that the said appellant-accused has been shifted to District Jail at Bhavnagar. Therefore, the intimation in prescribed form will be required to be communicated to him at the said place and, therefore, the office shall communicate the present order to the said appellant through the concerned jail authority.

(D.P. Buch, J.)

(H.H. Mehta, J.)

syed/